United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 75-7307

United States Court of Appeals

FOR THE SECOND CIRCUIT

AL DAYON, individually and on behalf of MASTERCRAFT ELECTRONICS CORP.,

Plaintiff-Appellant,

—against—

THE HONORABLE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, THE HONORABLE HAROLD A. STEVENS, THE HONORABLE THEODORE R. KUPFERMAN, THE HONORABLE GEORGE TILZER, THE HONORABLE AARON STEUER and THE HONORABLE EMILIO NUNEZ, JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT,

Defendants-Appellees,

THE HON. VINCENT A. MASSI, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, DOWNE COMMUNICATIONS, INC., EDWARD R. DOWNE, JR., WILLIAM H. KEHL as Sheriff of the City of New York, and THE AETNA CASUALTY AND SURETY COMPANY,

Defendants.

BRIEF FOR PLAINTIFF-APPELLANT

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Statement and Facts

This is an appeal from an order dated April 22, 1975 of the United States District Court for the Southern District of New York by the Honorable Robert J. Ward, District Court Judge, which dismissed the complaint herein on the ground that the court lacks jurisdiction over the subject matter under Fed. Rules Civ. Proc., Rule 12(b)(1), 28 U.S.C.A.

The District Court, by its memorandum decision (5-9) showed that it would have found subject matter jurisdiction, but for its conclusion that the "Plaintiff's claimed deprivations are, in this Court's view, sufficiently without merit to preclude the invocation of subject matter jurisdiction. There is, for example, no constitutionally guaranteed right to a pre-judgment attachment. In fact, a three-judge court in Bert Randolph Sugar and Wrestling Revue, Inc. v. Curtis Circulation Co., 74 Civ. 78 (S.D.N.Y. Oct. 17, 1974), appeal docketed, 43 U.S.L.W. 3405 (U.S. Jan. 13, 1975) (Nos. 74-858 and 74-859) raises a number of serious questions concerning the constitutionality of the New York statute which authorized the pre-judgment order of attachment originally granted to the plaintiff. Moreover, any deprivation of rights which may have obtained from the unfavorable judgment of March 13th was self-imposed since plaintiff voluntarily refused to amend his complaint. There is no constitutionally protected right to litigate such matters. In essence, therefore, plaintiff seeks to have this Court review the propriety of state court orders and a judgment. This it cannot do. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). See, also , Hill v. McClellan, 490 F. 2d 859, 860 (5th Cir. 1974); Atchley v. Greenhill, 373 F. Supp. 512, 514 (S.D. Texas 1974); Jemzura v. Belden, 281 F. Supp. 200, 205 (N.D.N.Y. 1968). Plaintiff also asks this Court to grant relief very much akin to the relief he sought in the state litigation. For example, he asks this Court to

declare his complaint to have been legally sufficient. He also requests this Court to annul the vacation of a prejudgment order of attachment. Such actions are proper for an appropriate appellate court but not a federal trial court. See, e.g., Adkins v. Underwood, 370 F. Supp. 510, 514-15 (N.D. Ill. 1974). Plaintiff has, therefore, not advanced a claim cognizable under either the Civil Rights Act or the Constitution. Accordingly, the defendants' motion to dismiss for lack of subject matter jurisdiction is granted...." (8-9).

The jurisdiction for the complaint was alleged to be and was based upon 42 U.S.C. Section 1983, 28 U.S.C. Section 1343(3). The complaint demanded injunctive and declaratory relief (20).

The Issue on Appeal

The primary issue on this appeal is whether the appellant's claim of unconstitutionality of the New York State statutes as applied is unsubstantial "either because it is obviously without merit or because its unsoundness so clearly results from previous decisions of this court as to foreclose the subject." California Water Service Co. v. Redding, 304 U.S. 252, 255, 58 S. Ct. 865, 867, 82 L. Ed. 1323. Unless all of the appellant's claims for relief are unsubstantial as a matter of law, then the order on appeal must be reversed and a three-judge court empanelled to consider the claims for declaratory

and injunctive relief. Ex parte Northern Pac. R. Co., 280 U.S. 142, 144, 50 S. Ct. 70, 74 L. Ed. 233 (1929); Stratton v. St. Louis S.W.R. Co., 282 U.S. 10, 15, 51 S. Ct. 8, 75 L. Ed. 135 (1930); Idlewild v. Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 82 S. Ct. 1294, 8 L. Ed. 2d 794 (1962); Schneider v. Rusk, 372 U.S. 224, 225, 83 S. Ct. 621, 9 L. Ed. 2d 695 (1963).

Point I

The District Court decided the motion on a different basis than those alleged by the appellees.

The District Court decided this motion upon a different basis than those alleged by the appellees on their motion (12-16). The motion by the appellees under Fed. Rules Civ. Proc., Rule 12(b)(1), 28 U.S.C.A. was based upon the theory set forth in Tang v. Appellate Division of N.Y. Supreme Ct. First Dept., 487 F. 2d 138, 142 (2d Cir. 1973); Anderson v. Lecon Properties, Inc., 457 F. 2d 929, 930 (8th Cir. 1972) cert. den. 409 U.S. 879, and Lecci v. Cahn, 493 F. 2d 826, 829 (2d Cir. 1974) cited by them (12-16). Those cases stand for the proposition "that a plaintiff who elects to vindicate his constitutional rights through state court proceedings which can be appealed as of right to the highest state appellate court and from there to the Supreme Court, must so pursue his rights and

remedies and cannot or should not be heard to break off in midstream and turn to the federal court to make and pursue the same rights and remedies. That rule is totally inapplicable to this case because the plaintiff has never before commenced any action, either in the state court, or in any federal court, to vindicate the constitutional rights sought to be vindicated by this action." (17, 18). Before the District Court rendered the decision in this case, the appellant had no opportunity to meet and to answer the issues raised by the decision. A reading of the appellee's memorandum of law in support of their motion shows that they did not contemplate the grounds upon which the District Court granted their motion. Thus, neither side had the opportunity to brief and to argue the issues presented by the District Court memorandum decision. See, Thompson v. Washington, 497 F. 2d 626, 643 (D.C. Cir. 1973). The District Court decided this motion without allowance of oral argument. That would have disclosed the issues raised by the District Court and would have enabled both sides to address themselves thereto. The disposition by the District Court deprived appellants of their right to notice and an opportunity to be heard. See, Coe v. Armour Fertilizer Works, 237 U.S. 413, 425 (1914); Reynolds v. Stockton, 140 U.S. 254, 268-269 (1890); Brinkerhoff-Faris Trust Co., 281 U.S. 673, 680-682 (1930); Shelley v. Kraemer, 334 U.S. 1, 4 (1947).

Point II

This Court has jurisdiction to review the action of a one-man district court which dismissed the complaint instead of taking steps to convene a three-judge court.

"This court has jurisdiction to review the action of a one-man district court in dismissing a complaint instead of taking steps to convene a three-judge court. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 82 S. Ct. 1294, 8 L. Ed. 2d 794 (1962); Schackman v. Arnebergh, 387 U.S. 427, 87 S. Ct. 1622, 18 L. Ed. 2d 865 (1967); Money v. Swank, 423 F. 2d 1140 (7th Cir. 1970); Hargrave v. McKinney, 413 F. 2d 320 (5th Cir. 1969); see also C. Wright, The Law of Federal Courts (2nd ed. 1970) at 19[illegible] and D. Currie, Appellate Review of the Decision Whether or Not to Empanel a Three-Judge Federal Court. 37 U. Chi. L. Rev. (1969-70). Although we can review, the question before this court is a narrow one. If the federal claims are substantial, the issues and the merits are for consideration by a three-judge panel and this court does not express any opinion as to ultimate resolution of the issues. Although this court is precluded from reviewing on the merits, it is not 'powerless' to give guidance. Idlewild, supra, citing Stratton v. St. Louis S.W. Ry., 282 U.S. 10, 51 S. Ct. 8, 75 L. Ed. 135. Our function is to review the allegations of the complaint to determine whether a substantial federal constitutional question is presented and whether there

is a question fairly open to debate which would entitle plaintiffs to the three-judge relief requested.... In 1942 the three-judge statute was amended and one of the provisions then added (now codified as 28 U.S.C. Section 2284(5) states that a single judge 'shall not .... hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter summary or final judgment.... In a later 1962 case, Idlewild, supra, the Supreme Court set forth what appears to be the present limits on a single judge's power when application is made to him for a three-judge court: 'When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case comes within the requirements of the three-judge statute.' The Court then went on to say that if those criteria are met it is 'impermissible for a single judge to decide the merits of the case, either by granting or by withholding relief.' Since our jurisdiction is no greater than that of the district judge, we too must look to the allegations of the complaint and at the regulations challenged." (Emphasis supplied). Holiday Magic, Inc. v. Warren, 497 F. 2d 687, 689-691 (7th Cir. 1974).

The Court of Appeals in Holiday Magic, Inc. v. Warren, 497 F. 2d 687 (7th Cir. 1974) held that the complaint at least

formally alleged a substantial constitutional question even though the challenged state regulation had been held constitutional by the highest court of that state. The threshhold question of substantiality has a very low threshhold.

Point III

The Federal Court has subject matter jurisdiction as to the claims for relief alleged.

Jurisdiction of this action lies under 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343(3).

"Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and law of the nation. It is clear from the legislative debates surrounding passage of Section 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment against State action .... whether that action be executive, legislative, or judicial'. Ex parte Virginia, 100 U.S. 339, 346 (emphasis supplied). Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected

rights ... The very purpose of Section 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights - to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial'. Exparte Virginia, 100 U.S. at 346. In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in Section 1983 actions, by expressly authorizing 'a suit in equity' as one of the means of redress. And this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights. Ex parte Young, 209 U.S. 123; cf. Truax v. Raich, 239 U.S. 33; Dombrowski v. Pfister, 380 U.S. 479. For these reasons we conclude that under the criteria established in our previous decisions construing the anti-injunction statute, Section 1983 is an Act of Congress that falls with the 'expressly authorized' exception of that law..." Mitchum v. Foster, 407 U.S. 225, 239, 240 (1971).

"When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of a

three-judge court." Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 82 S. Ct. 1294, 8 L. Ed. 2d 894 (1962).

The Supreme Court in Hagans v. Levine, 415 U.S. 528, 536 (1973) stated: "Over the years this Court has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit', Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579 (1904); ' wholly insubstantial', Bailey v. Patterson, 369 U.S. 31, 33 (1962); 'obviously frivolous', Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288 (1910); 'plainly unsubstantial', Levering v. Garrigues Co. v. Morrin, 289 U.S. 103, 105 (1933); or no longer open to discussion', McGilvra v. Ross, 215 U.S. 70, 80 (1909) .... Only recently this Court again reviewed this general question where it arose in the context of convening a three-judge court under 28 U.S.C. Section 2281: "'Constitutional unsubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious', Bailey v. Patterson, 369 U.S. at 33; 'wholly unsubstantial' ibid; 'obviously frivolous', Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288 (1910); and 'obviously without merit', Ex parte Poresky, 290 U.S. 30, 32 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words

impart that claims are constitutionally unsubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. Section 2281. A claim is insubstantial only if '"soundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for an inference that the questions sought to be raised can be the subject of controversy."' Ex parte Poresky, supra, at 32, quoting from Hannis Distilling Co. v. Baltimore, supra, at 288; see also Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105-106 (1933); McGilvra v. Ross, 215 U.S. 70, 80 (1909)." Goodby v. Osser, 409 U.S. 512, 518 (1973). The substantiality doctrine as a statement of jurisdictional principles affecting the power of a federal court to adjudicate constitutional claims has been questioned, Bell v. Hood, 327 U.S. 678, 683 (1943), and characterized as 'more ancient than analytically sound', Rosado v. Wyman, supra (397 U.S. 397) at 404. But it remains the federal rule and needs no reexamination here, for we are convinced that within accepted doctrine petitioners' complaint alleged a constitutional claim sufficient to confer jurisdiction on the District Court to pass on the controversy.

Jurisdiction is essentially the authority conferred by Congress to decide a given type of case one way or the other. The Fair v. Kohler Die Co., 228 U.S. 22, 25 (1913). Here, Sections 1343(3) and 1983 unquestionably authorized federal courts

to entertain suits to redress the deprivation, under color of state law, of constitutional rights. It is also plain that the complaint formally alleged such a deprivation. The District Court's jurisdiction, a matter of threshold determination, turned on whether the question was too insubstantial for consideration."

The District Court below while citing Hagans v. Levine, 415 U.S. 528 (1973), failed to follow it.

The matter of substantiality was addressed by a three-judge court in Law Students Civil Rights Research Council, Inc. v. Wadmond, 299 F. Supp. 117 (S.D.N.Y., 1969), affirmed on other grounds, 401 U.S. 174 (1971): "Since these students raise a substantial constitutional question with respect to at least one of the statutes, a court of three judges is required for that purpose; the argument that attacks on the questionnaires should be remitted to single district Judge will be examined later in this opinion."

"In considering whether an injunction or declaratory judgment should be issued, we start with the principle of Ex parte Young, 209 U.S. 123, 28 S. Ct. 44, 52 L. Ed. 714 (1908), that when officers administering a state statute act in a manner that exceeds constitutional limits, they have no claim to sovereign immunity. Against this is the equally well settled principle that a judge exercising his judicial

function is not liable for damages under 42 U.S.C. Section 1983. Pierson v. Ray, 386 U.S. 547, 553-555, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967). .... We fail to perceive what interest would be served by holding federal courts to be powerless to enjoin state officers from acting under a statute that allegedly deprives citizens of rights protected by the Civil Rights Acts or promulgating regulations that are alleged to have that result simply because some of them are robed and others have been appointed by those who are. ... The grant of injunctive relief in a case like this would not have an in terrorem effect on state judges that the threat of a subsequent damage action would have; rather it would furnish a definitive ruling on a point of federal law for their future guidance, and, as shown above, fm. 4*, would not infringe the policy expressed in the federal anti-injunction statute, 28 U.S.C. Section 2283, proscribing injunctions that would stay proceedings in a state court. .... To hold otherwise would be to leave without a remedy a significant class of the deprivations of federal rights under color of state law that Congress intended the federal courts to redress under 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343. '...The first ground lies in

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*4: '...The purpose of the anti-injunction statute is to prevent a state court defendant from invoking the aid of a federal court to block an action instituted against him - not to prevent a state court applicant from seeking federal aid to eliminate what he considers an unconstitutional roadblock created by it.'

the difference between an attack on the order of an administrator as such, and on the Statute as applied by him. The distinction admittedly is elusive, since, on the one hand, as said in Phillips v. United States, 312 U.S. 242, 252, 61 S. Ct. 480, 484, 85 L.E. 800 (1941) 'some constitutional or statutory provision is the ultimate source of all actions by state officials' and on the other, no statute is self-enforcing. Whatever the difficulties of articulation there is a perceptible difference between a challenge to a governor's 'single unique exercise' of power, 312 U.S. at 253, 61 S. Ct. at 484, under a statute of unquestioned validity empowering him generally to call out the national guard in case of war or 'any forcible obstructing of the execution of the laws or reasonable apprehension thereof, and at all other times he may deem necessary", and the continuing administrative implementation of a statute, itself under attack, which is constitutional if applied in one way and not if in another. To put the point in a slightly different way, if the administrator is interpreting legislative policy, even a local application requires three judges; if he is making policy under a delegation, his local action can be tested by a single judge. See for further discussion Sardino v. Federal Reserve Bank, supra, 361 F. 2d at 115; D. Currie, supra, 324 Chi. L. Rev. at 37-55, D. Currie, Federal Courts 534-35 (1968). '...Although a single district judge is without power to act in a case requiring three judges, the opposite is not true.' Swift & Co. v. Wickham,

230 F. Supp. 398, 410 (S.D.N.Y. 1964) app. dismissed for want of jurisdiction 382 U.S. 111, 86 S. Ct. 258, 15 L.Ed. 2d 194 (1965), aff'd. 364 F. 2d 241 (2d Cir. 1966) cert. den. 385 U.S. 1036, 87 S. Ct. 776, 17 L. Ed. 2d 683 (1967)."

The District Court misapprehended the four claims for relief as alleged in the complaint. The appellant is not seeking appellate review in the federal court of mere errors by the named Justices in the exercise of power and jurisdiction which they possessed under New York law, but rather, the appellant seeks in the federal court under the authority of 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343(3), declaratory and injunctive relief under 28 U.S.C. Sections 2201 and 2283, because of violations and deprivations of appellant's constitutional rights by these Justices acting under color of state law by the arbitrary and illegal assumption of power and jurisdiction where they had no such power and jurisdiction under New York State law and by the exercise of unlawful and arbitrary power and jurisdiction contrary to the settled law of the State of New York.

The appellant alleges four claims for relief. The first claim for relief seeks to have the federal court pass upon the constitutionality of New York Civil Practice Law and Rules, Section 6201, Rule 6212(a) and Section 6223 as applied by the appellees. (20-23). The complaint alleges that the

New York Civil Practice Law and Rule provides for and authorized the plaintiff in his action for a money judgment, upon the specified grounds, to obtain an order of attachment against the property of defendant Downe Communications, Inc. to secure the payment of any judgment that may eventuate from that action (25-28); that the order of attachment was granted (25) and was a valued property right of the plaintiff (27-29); that the plaintiff filed a $100,000.00 attachment bond conditioned that plaintiff would pay in the event that it was finally determined that plaintiff was not entitled to the order of attachment (28, 29); that the plaintiff fully and duly complied in all respects with the New York Attachment Statute, in particular, with CPLR 6201 and 6212(a) and was entitled to the order of attachment against the property of the defendant Downe Communications, Inc. (24-33); that the plaintiff by affidavits alleged facts establishing prima facie that he had a cause of action against defendant Downe Communications, Inc. for a money judgment in excess of all known counterclaims (24-33); that defendant Downe Communications, Inc. conceded that plaintiff had alleged facts establishing a prima facie cause of action for breach of contracts (25, 35); that after the New York Supreme Court at Special Term Part II had granted to the plaintiff the order of attachment against defendant Downe Communications, Inc., the said defendant Downe Communications, Inc. made three separate motions to vacate the order of attachment at New York Supreme Court at Special Term Part I (29, 34); that the New York

Supreme Court at Special Term Part I denied each of those three motions and sustained the validity and grant of the order of attachment (29-34); that defendant Downe Communications, Inc. appealed those orders to the Appellate Division, which reversed and vacated the order of attachment (34-37); on the ground that four of the six causes of action alleged in the complaint were insufficient as a pleading (36); that the order of the Appellate Division was arbitrary, illegal and beyond the power and jurisdiction of the Appellate Division and deprived appellant of due process of law and equal protection of law (38-44; 58-71); that under the statutes and the settled law of the State of New York, a complaint as a pleading is totally and utterly unnecessary and forms no basis whatever for determining the validity or invalidity of an order of attached, and whether an order of attachment can or cannot, should or should not be granted or allowed, or vacated (38-44); and denied the appellant Dayon his constitutional rights to due process of law and equal protection of the law (58-71); that the Appellate Division by its decision showed that it had not considered the affidavits submitted by Dayon in support of the order of attachment, and that it had only considered the complaint as a pleading (42); that even if the plaintiff's papers had been defective, that New York Civil Practice Law and Rules, Section 6223, withholds from every state court the power to vacate an order of attachment upon the ground that a plaintiff's papers are defective until after the court has

given that plaintiff a reasonable opportunity to correct any defect (57, 71); that the said Appellate Division did not do so (58), did not allege or point out any defect in the plaintiff's affidavits which had been submitted in support of the order of attachment (58a).

The complaint alleges that the statement in the Appellate Division decision dated February 13, 1973 that "Furthermore, there is grave doubt as to whether an attachment is needed to secure plaintiff and whether the material submitted is deceptive", has no legal meaning (36, 42, 43); that, as a matter of law, it was not a determination that the order of attachment was unnecessary to the security of the plaintiff pursuant to CPLR Section 6223 (42, 44); that Downe Communications, Inc. had no assets whatever in the State of New York subject to attachment which could secure the payment of a judgment against Downe Communications, Inc., except the windfall cash sum in the bank sought to be attached, and that all of its assets were mortgaged and assigned to Bank of New York and First National City Bank as collateral for outstanding loans which were in default (42, 43); that even if there had been any defects in the papers in support of the order of attachment, the Appellate Division did not say so and did not point out any, and as a matter of law, was required to do so if there were any and give the plaintiff a reasonable opportunity to correct any defect, which the appellees did not do,

as a condition precedent to the existence of the power and jurisdiction of the appellees to vacate an order of attachment for that reason (43-44).

The Appellate Division made no finding that defendant Downe Communications, Inc. was not a foreign corporation, which it was, and made no finding that the Supreme Court at Special Term Part II and at Special Term Part I were wrong, or had abused their discretion by granting and by sustaining the order of attachment and denying the three motions to vacate the order of attachment, and made no finding that plaintiff Dayon had failed to establish prima facie one or more causes of action for money damages against Downe Communications, Inc., and made no finding that upon a consideration of the affidavits that the action by Dayon "must ultimately be defeated". American Reserve Insurance Co. v. China Ins. Co., 297 N.Y. 322, 325 (1948). It is the well settled law of the State of New York that a complaint as a pleading is unnecessary in order to apply for or to sustain an order of attachment. CPLR Rule 6212(a); Raimondi v. Fedeli, 30 A.D. 2d 802, 291 N.Y.S. 2d 900 (1st Dept. 1968); 7A Weinstein-Korn-Miller, N.Y. Civ. Practice, Section 6223.12. Section 6212.02. It is the well settled law of the State of New York, that an order of attachment having been granted against a non-resident or foreign corporation, that "The plaintiff made no motion before trial to vacate the attachment. He was correctly advised by his counsel that such a motion would be futile, for

the warrant was valid on its face and the plaintiff was in fact a non-resident. No contention can be seriously raised that this plaintiff could have rid himself of the warrant of attachment except by a trial on the merits." Thropp v. Erb, 255 N.Y. 75, 79 (1930). The Supreme Court, New York County, in A.D. Israel Commodity Co. v. Banco do Brazil, 50 Misc. 2d 362, 270 N.Y.S.2d 283, 286, held: "The action being for a money judgment and Israel being a foreign corporation it was per se subject to attachment. Civil Practice Act Section 903(1); CPLR 6201(1); Zeiberg v. Robosonics, Inc., 43 Misc. 2d 134, 250 N.Y.S. 2d 368, 369 (A.T. 1st Dept. 1964)."

The Appellate Division in Badijian v. Badijian, 30 A.D. 2d 522, 290 N.Y.S. 2d 577, 578 (1st Dept. 1968) held: "Defendant-respondent concededly is a non-resident. The action is for a money judgment and plaintiff's showing is to the effect that they may be entitled to the amount demanded. In the circumstances, defendant-respondent being a non-resident the attachment should be reinstated [CPLR Section 6201(1)]."

The Appellate Division stated in its memorandum opinion that "Furthermore, there is a grave doubt as to whether an attachment is needed to secure plaintiff" (134). The Appellate Division did not explain what it meant by that equivocal and obscure statement. It had no legal meaning under CPLR 6223. CPLR Section 6223 provides: "If, after the defendant has appeared in the action, the court determines

that the attachment is unnecessary to the security of the plaintiff, it shall vacate the order of attachment." That Appellate Division construed CPLR Section 6223, quoted, as requiring, before a court can consider whether an order of attachment should be vacated as "unnecessary to the security of the plaintiff", that the court expressly find as a matter of law that the plaintiff was entitled to the order of attachment, that is that the order of attachment was properly issued and complied with CPLR 6201 and Rule 6212(a), to wit: "On this motion, brought by order to show cause to vacate an attachment properly issued against the property of a foreign corporation, the burden is on the defendant to show that the attachment is unnecessary to the security of the plaintiff. (See, CPLR 6223; George A. Fuller Co. v. Vitro Corp., 26 A.D. 2d 916, 274 N.Y.S. 2d 600). On the record we conclude that the defendant failed to sustain that burden and therefore that the attachment should not have been vacated." Hydromar Corp. etc. v. Construction Aggregates, etc., 32 A.D. 2d 749, 300 N.Y.S. 2d 797 (1st Dept. 1969). The Appellate Division construed CPLR 6223 as authorizing the court to consider vacatur of the order of attachment on the ground that it is "unnecessary to the security of the plaintiff" only if the court should make a finding in the very words of the statute that the attachment was "unnecessary to the security of the plaintiff", to wit: "In the circumstances, the attachment could only be vacated if it should be found that it is 'unnecessary to the

security of the plaintiff.'" George A. Fuller Co. v. Vitro Corp., 26 A.D. 2d 916, 274 N.Y.S. 2d 600 (1st Dept. 1969). The Supreme Court, New York County, expressly held and found that Downe Communications, Inc. had not met that burden ( ), and that on the contrary that the facts showed a necessity for the order of attachment. Downe Communications, Inc. had no property in the State of New York and whatever property it did own it had assigned to First National City Bank and to Bank of New York, jointly, on account of large outstanding and defaulted loans ( ). Its own balance sheet showed that its liabilities exceeded its assets by at least $2,173,000.00, not counting pending lawsuits against it and only if "inventories, receivables and prepaid items are realizable in full" (167-171) which is rarely the case. "An appellate court cannot invest itself with jurisdiction to reverse a lawful judgment free from legal errors by the mere assertion that it reverses upon the facts when the record shows that there are no questions of fact upon which to base a reversal. It cannot create a question of fact by declaring that there is one, nor by assuming to reverse on the facts, reverse a determination that does not involve a question of fact. .... Unless there was a material question of fact the reversal was an unlawful exercise of judicial power..." Otten v. Manhattan Rug Co., 150 N.Y. 395 (1896).

The third claim for relief against defendant New York

Supreme Court Justice Vincent A. Massi seeks to have the federal court pass upon the constitutionality of Civil Practice Law and Rules, Rule 3024(a), Rule 3015, and Section 2004, as applied. The complaint alleges that defendants Chemical Bank, Dommerich, Barlow and Natov, by order to show cause dated January 5, 1973 moved for an order to extend their time to answer (47), that no other relief was requested (47) and no general prayer for relief was made (47); that such motion was not joined to or made with any other motion by any other party (47-48); that the motion was duly opposed on the ground it was made (48); that at the time of that motion the defendants Downe Communications, Inc., Edward R. Downe, Jr. and Campbell-Reynolds, Inc. were in default in answering the complaint in that New York Supreme Court action (50); that defendant Regal Advertising Associates, Inc. had already answered and had made no motion directed to the complaint (49-50); that notwithstanding, New York Supreme Court Justice Massi rendered a decision on the Chemical Bank motion to extend time to answer dismissing the Dayon complaint for unspecified "vague and ambiguous" allegations (48, 49); that appellant was deprived of his right to notice and an opportunity to defend upon such an issue (52, 53); that under New York law there is no authority or power granted to any court to dismiss any complaint for alleged "vague and ambiguous" allegations (50); that Supreme Court Justice Vincent A. Massi had no power and no authority to dismiss the complaint (50); that the order of

Supreme Court Justice Vincent A. Massi is illegal, null and void and deprived appellant of his right to due process of law and to equal protection of the law. (49, 50, 52, 53).

The complaint is not that the Supreme Court committed error in the exercise of a power which it had; the complaint is that the New York Supreme Court had no power to dismiss any complaint upon the ground that the complaint allegations were "vague and ambiguous" (49, 50, 52). Furthermore, defendants Downe Communications, Inc., Edward R. Downe, Jr., and Campbell-Reynolds, Inc. were in default (50) and thus, as a matter of law, had waived any right to move for that relief. CPLR Rule 3024(c).

The order of the New York Supreme Court by Justice Massi dismissing the complaint for unspecified "vague and ambiguous" allegations, as to which no motion had been made by any party was an exercise of power and jurisdiction which that Court did not possess and which the Legislature had never confided to it; it was an assumption of jurisdiction which it did not have and deprived the appellant of the due process of law and of equal protection of the law and was arbitrary, illegal, null and void (49-50, 52, 53).

CPLR 3024(a) provides: "If a pleading is so vague or ambiguous that a party cannot reasonably be required to frame a response, he may move for a more definite statement."

There is no provision of law in the State of New York which authorizes or empowers a court to dismiss any cause of action or complaint on such a ground. Dismissal of a complaint under a CPLR 3024(a) motion is not authorized. 3 Weinstein-Korn-Miller, Section 3024.06. "Under rules 102 and 103 of the Rules of Civil Practice, an amended pleading may be required to clarify or eliminate irrelevant matter. .... There is no authority under either rule for a dismissal of the complaint, with or without prejudice." Bradford v. 27 East 38th Street Realty Corp., 4 A.D. 2d 830, 166 N.Y.S. 2d 432 (1st Dept. 1957). CPLR 3024(a) is derived from Rule 102 of the Civil Practice Act. 7B McKinneys CPLR Rule 3024, p. 529. In this case, neither Chemical Bank nor any party had made a motion directed against the complaint (47, 48). The sole and specific relief Chemical Bank sought by the order to show cause was to extend its time to answer (47). No general prayer for relief was included (47). By that order to show cause, no relief other than that which was expressly specified could have been granted. 2 Carmody-Wait 2d, Section 8:70, pp. 91-92; Requard v. Theiss, 19 Misc. 480, 43 N.Y.S. 1066 (A.T. 1st Dept., 1897); Weeks v. Coe, 11 App. Div. 337, 97 N.Y.S. 704 (2d Dept. 1906). Even if such a motion had been made by any party (no one made such a motion) the failure of a party to specify in the notice of motion the parts of the complaint which are sought to be made more definite and certain constitutes a fatal defect. Schwartz v. Marjolet, Inc., 214 App. Div. 530, 212 N.Y.S. 2d 464 (1st

Dept. 1925).

The fourth claim for relief seeks to annul the order of the appellees which dismissed the appellant's appeal to that Appellate Division from the order of Justice Massi dated February 27, 1973 which dismissed the complaint on the ground that it contained unspecified "vague and ambiguous" allegations (53-54) on the ground that such order was contrary to the law and that appellant had the right under New York law to have that order reviewed on appeal (54). The order of the Appellate Division was arbitrary, contrary to law, illegal, null, and void and was an exercise of jurisdiction which it did not have and which was not confided to it by New York law and deprived the appellant of due process and equal protection of the law. The appellant had a right to appeal that order and he had a right to have the Appellate Division review that order on the appeal. CPLR 5701(a)(2)(v); 7 Weinstein-Korn-Miller, Section 5701.03, Section 5701.05. The order is appealable and reviewable independently of the appeal from the judgment. Kirsch v. Herculean Products Co., 205 App. Div. 530, 199 N.Y.S. 417 (1st Dept. 1923); Banes v. Rainey, 130 App. Div. 465, 114 N.Y.S. 986 (1st Dept. 1909); 7 Weinstein-Korn-Miller, Section 5701.20; Kahn v. M.J.P. Enterprises, Inc., 17 A.D. 2d 775, 232 N.Y.S. 2d 583 (1st Dept. 1962); Sacramona v. Scalia, 36 A.D. 2d 632, 634 (1st Dept. 1971); Donnelly v. Bauder, 217 App. Div. 59, 216 N.Y.S. 2d 437 (4th Dept. 1926); Godofsky v.

Hirsch, 263 App. Div. 970, 33 N.Y.S. 2d 118 (2d Dept. 1942); M. & S. Mercury Air Cond. Corp. v. Dunkirk, 18 A.D. 2d 1014, 239 N.Y.S. 2d 190 (2d Dept. 1963); Barber v. Rose, 200 App. Div. 290, 193 N.Y.S. 157 (3rd Dept. 1922); Schamber Chemical, etc. v. Ross & Kaminsky, etc., App. Div., 18 N.Y.S. 2d 368 (4th Dept. 1940); Wilde v. Caron Corp., 20 A.D. 2d 931, 249 N.Y.S. 2d 717 (2d Dept. 1964); Kriger v. Industrial Rehab.Corp., 8 A.D. 2d 29, 185 N.Y.S. 2d 658, aff'd. 7 N.Y. 2d 958, 198 N.Y.S. 2d 611; Simmons v. Capra, 273 App. Div. 88, 75 N.Y.S. 2d 574, 576 (4th Dept. 1947); 10 Carmody-Wait 2d, Section 70:36, pp. 302, 303; 7 Weinstein-Korn-Miller, Section 5701.18, pp. 57-27; 10 Carmody-Wait 2d, Section 70:106, p. 371.

"The right of an appeal has been recognized uniformly by the Legislature, as 'our law considers it an essential right of a suitor to have his cause examined in tribunals superior to those in which he considers himself aggrieved'. Yates v. People, 6 Johns (N.Y.) at p. 363." Handy v. Butler, 83 App. Div. 359, 169 N.Y.S. 770 (2d Dept. 1918). "The right to review a decision of a single judge sitting at Special Term, in a matter affecting substantial rights, being general and fundamental, it must be deemed to exist, unless the intent to destroy it is expressed with great clarity." Carmody-Wait, 2d, 70:12, p. 283; Re Brady, 69 N.Y. 215, 220 (1877). An order dismissing a complaint not only affects substantial

rights under CPLR 5701(a)(2)(v) but it is a final order and would be appealable as a matter of right to the New York Court of Appeals, regardless of the grounds assigned by the court. Paradis v. Doyle, 290 N.Y. 855 (1943); Cohen & Karger, Power of New York Court of Appeals, Section 37; Sirlin Plumbing Co. v. Maple Hill Homes, Inc., 20 N.Y. 2d 401, 283 N.Y.S. 2d 489 (1967); Condon v. Assoc. Hospital Service, 287 N.Y. 411 (1942); Howard Stores v. Pope, 1 N.Y. 2d 110, 150 N.Y.S. 2d 792 (1956); Dulberg v. Mock, 1 N.Y. 2d 54, 150 N.Y.S. 2d 180 (1956); Kober v. Kober, 16 N.Y. 2d 191, 264 N.Y.S. 2d 364 (1965).

Conclusion

The constitutional issues presented are not unsubstantial and the order of the District Court should be reversed.

Respectfully submitted,

Charles Sutton,
Attorney for Appellant

March 10, 1976

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